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No. 344436
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CONSOLIDATED CASES

MARY ALICE CARLSON, Respondent, Cross-Appellant

v.

HUGH DAVID CARLSON, Appellant, Cross-Respondent

_____ AND _____

HMD LIMITED PARTNERSHIP, Appellant

v.

**MARY ALICE CARLSON and SOUTH 80 LIMITED
PARTNERSHIP, Respondents**

**REPLY OF APPELLANT
HMD LIMITED PARTNERSHIP**

R. Bruce Johnston, WSBA #4646
JOHNSTON JACOBOWITZ & ARNOLD, PC
2701 First Ave, Suite 200
Seattle, WA 98121
(206) 866-3230
(206) 866-3234 (Fax)
bruce@rbrucejohnston.com
*Counsel for Appellants Hugh David
Carlson and HMD Limited
Partnership*

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I. INTRODUCTION

This is the Reply Brief of Appellant HMD Limited Partnership (“HMD”), which, despite Respondent Mary Carlson’s attempt to blur the lines in her brief, remains a separate entity from its General Partner, Appellant Hugh David Carlson (“David Carlson” or “Mr. Carlson”). As Mrs. Carlson concedes, HMD has other limited partners. The trial court therefore correctly recognized that the Carlsons’ marital community could and did owe money to HMD. The trial court erred, however, when it refused to toll the statute of limitations as to some of that debt, based on a refusal to recognize the consequences of the fiduciary duty to disclose owed by Mary Carlson, its general partner. That was plain error. Mrs. Carlson’s formalistic quibbling about the scope of issues on appeal misstates the record and cannot rescue that error.

Mrs. Carlson also errs when she characterizes HMD’s claim to a specific, known sum of money—\$226,485.05—which she wrongly took and kept from HMD, as “unliquidated.” HMD’s claim to a specific, traceable amount, was the very definition of liquidated, and subject to pre-judgment interest. In fact, the trial court easily calculated the interest due on that amount for the short period (November 19, 2013 to January 9, 2014) for which it awarded interest. CP 291:13–23; CP 316:20–317:22; CP 334:6 –17; CP 84–85.

Mrs. Carlson fails to squarely confront HMD's third issue on appeal: that the trial court erred when it both denied recovery¹ of some of HMD's debt, and at the same time, counted that debt towards HMD's value. That too was plain error.

The assignments of error made by HMD, respectively, should be sustained, and the trial court reversed in respect of those issues.

II. REPLY STATEMENT OF THE CASE

While HMD does not fully agree with Mrs. Carlson's Statement of the Case, little of it relates to HMD's issues on appeal. With regard to HMD's issues, Mrs. Carlson omits important facts and obscures the record. Accordingly, the following brief Reply Counter-Statement of the Case is submitted; contentions by Mrs. Carlson are set forth in italics, with the responses of HMD in regular text immediately below.

1. *HMD's claims for loans in 2003 and 2007 were dismissed "based on the applicable statute of limitations."* Resp. Brief 11, 43.

Agreed, the sole basis for denial was the three-year statute of limitations.

2. *"Mr. Carlson now had virtually unfettered access to \$1,000,000 -- \$1,250,000.00 after paying Mrs. Carlson only \$65,000."* Resp. Brief 26.

¹ The trial court said the debt was "extinguished." CP 292:13.

Unfounded and incorrect. The trial court made no findings, nor could it, concerning future access to HMD funds. As discussed below, the trial court's decisions virtually wiped out Mr. Carlson's interest in HMD.

3. *Mrs. Carlson admits that the 2003 and 2007 transfers were made:*

"For the claimed to loans of 2003 and 2007 the Trial Court saw transfers of money but found no promises to pay." Resp. Brief 43.

Mrs. Carlson goes on to assert (without citation): "There was never any proof offered that Mrs. Carlson was actually the one who loaned or borrowed the money or acted with respect to any loans as a fiduciary." Id. at 45.

There is no doubt the loans were made, substantial evidence they were not repaid, and no evidence that they were repaid.² Mrs. Carlson wrote the checks. RP 296–298 and RP 552:16–17. From 2003 through at least 2010 Mrs. Carlson was in charge of HMD's bookkeeping.³ From 2003 through 2008, Mr. Carlson was working in Wenatchee for the Washington Apple Commission. RP 233. According to Mrs. Carlson, by sometime in 2004, she was primarily in charge of the farming operations; by sometime around 2003 or 2004, Mrs. Carlson "took over there completely." RP 234:20–22. Accordingly, when the 2003 and 2007 loans were made, and

² See HMD Appellant's Brief at 6.

³ RE 170, Excerpts of Mary Carlson Deposition April 4, 2014, p. 157:5–158:2.

immediately after, Mrs. Carlson was in charge of both sides of the transaction. Under those circumstances any lack of documentation was her fault.

4. *Mrs. Carlson asserts: “HMD never even asserted any claim for breach of fiduciary duty against Mrs. Carlson which pertained to any of the alleged loan transactions.... The claim of HMD regarding loans were [sic] solely asserted against South 80 Orchards as a breach of contract claim. CP at 1646-1647.” Resp. Br. at 45–46.*

At CP 1645, HMD alleges in its Complaint:

25. Mary has a fiduciary duty to HMD and her other partners pursuant to the HMO partnership agreements and RCW 25.05.165.
26. By acting in excess of her authority in such a way that damaged HMO, Mary breached that fiduciary duty.
27. Mary's violation of the partnership agreement and breach of fiduciary damaged, and continues to damage, HMO, for which it is entitle [sic] to recover.

Those facts are incorporated into HMD’s claim for outstanding loans. CP 1647. Mary Carlson **admitted**, without qualification, that she was a fiduciary to HMD in her Answer to HMD’s complaint. CP 1711, ¶ 25. The trial court pierced the corporate veil, holding that South 80 was “an empty shell” and that all of its assets were commingled with and a part of

the community's farming business. CP 310:13–22; *and see* CP 289:5–290:15. Accordingly, HMD's claim against South 80 Orchards properly proceeded as a claim against the community and Mrs. Carlson. The court recognized that claim, and ruled upon it. CP 295:7–10. The issue was fully briefed during trial. *See, e.g.*, Appendix 6. The very arguments made on this appeal by HMD, were made and entertained by the court at trial. *Id.*; *see also* RP 554:4–5 and Trial Exhibit (RE) 137, admitted at RP 552:17.

5. *“HMD has not assigned any assignment of error whatsoever to the Trial Court's finding that Mrs. Carlson did not violate any fiduciary duties.”* Resp. Br. at 45.

See infra, HMD's Assignment of Error #1 covers this issue.

6. *“the Trial Court clearly found that the Carlsons' [sic] used both HMD and South 80 without regard to their entity status and that the Carlson's [sic] and particularly Mr. Carlson moved assets between the entities without much regard to either their corporate existence or other shareholders or limited partners in either entities. CP at 289-291, 294, 301.”* Resp. Br. at 47.

Here, Mrs. Carlson slights analytical precision. The trial court pierced the corporate veil of Carlson Agribusiness, LLC and South 80 Orchards (unnecessarily as to Carlson Agribusiness, LLC, which Mr. Carlson

admitted throughout was community property). Although the trial court referenced withdrawals from HMD, at CP 291:5-7, it specifically found a much higher degree of commingling as to South 80:

. . . They together began the migration of assets from South 80 into their various other business entities. The assets weren't dissipated. They weren't concealed. They weren't sequestered for any one individual's benefit over the other. They were moved for their mutual benefit. Consequently, I would find that South 80 has been commingled and is now community property

CP 290:5-12. And there is evidence of only a single payment from the farming operations to HMD, which was fully endorsed by the court as proper. CP 292:22–293:21. At page 7 of her brief, Mrs. Carlson carefully elides the following bolded portion of the trial court's oral ruling at CP 289–290:

. . . **I think the other reality is, is I don't know how to describe it other than that they seemed to operate South 80, Carlson Orchards, Carlson Agribusiness, all of the entities, each in the same way, each entity very loosely,** very little attention or respect paid to the various corporate entities. They were really almost outward shells so that outsiders would see that these were corporate entities, but they, they moved in and out of them with kind of a personal flavor to it.

In the portion omitted by Mrs. Carlson, the trial court listed the entities used over time for farming operations, but **not** HMD. Equally important, the court is clear in its Order of March 3, 2016 (, that the basis for denying

certain of the HMD loans was solely the three-year statute of limitations.
CP 1329, ¶¶ 4, 5, 6

7. *“The Trial Court determined Mrs. Carlson was justified in her effort to preserve the status quo. CP at 291.”* Resp. Br. at 49.

While the trial court found that the transaction was not concealed or made with malice, the court clearly determined Mrs. Carlson’s actions were not proper and that the money should go immediately back to HMD: “. . . so the \$226,485.05 is ordered to be returned to HMD.” CP 291:14–15. The amount in the court’s registry didn’t earn interest, and remained the same throughout – the liquidated amount of \$226,485.05. *Id.*; and see CP 316:20–317:22 and CP 84–85. The order directing disbursement to HMD was entered the same day – and was the only immediate execution of the courts oral ruling that day. *Id.* In this connection, it should be noted that the trial court, after ordering return of the funds to HMD, immediately considered the amount withheld to be liquidated and subject to prejudgment interest at 12%:

That allows the remaining question about the interest that should be earned, and interest would be earned at 12%, but I'm finding that the interest would only be applicable for the, period November 19 to January 7. After that it was a Court-ordered sequestration, I guess, of the monies. It was certainly denied to HMO. It was denied to everyone's access for - in order to preserve the

status quo. Interest at that rate I calculate would be \$3,648.56.

CP 291:15–23. Interest at that rate, for that period, was then recalculated and ordered deducted from Mary Carlson’s distribution, obviously because she had wrongly withheld the funds from HMD. *Id.*; CP 316:20–317:23.

8. *The \$65,000.00 amount for Mrs. Carlson's 6.5% interest was based on HMD Limited Partnership being worth \$1,000,000.00 to \$1,250,000.00, which was a value provided by Mr. Carlson. RP at 677,605:22. Resp. Brief 9.*

While Mrs. Carlson cites RP 605, page 22, she fails to quote the surrounding text, quoted in HMD’s opening brief:

14 MR. JOHNSTON: Well, I was just asking him if he knows what HMD is worth. I mean, is it worth 500,000, a million?

16 A Approximately between 3 and 400,000.

17 Q And if it has receivables that are awarded by the Court, that would increase that, right?

19 A Correct.

20 Q It could go as high as a million dollars, right?

21 A Correct.

22 Q And if it was a million dollars that would mean that Mary Carlson's interest would be 65,000 dollars, correct?

24 A Correct.⁴

III. ARGUMENT

A. *The 2003 and 2007 Loans by HMD are Not Barred by the Three Year Statute of Limitations.*

1. Mrs. Carlson was a Fiduciary to HMD

Mrs. Carlson’s argument that the three-year statute of limitations applies, beginning at page 42 of her Response Brief, is more notable for what it does not include, than for what it does. Nowhere does Mrs. Carlson present any basis or authority to support the trial court’s refusal to consider Mrs. Carlson was acting as fiduciary to HMD at the time of the 2003 and 2007 loans, or her breach of fiduciary duty. The simple reason for that absence is, well -- there is no such authority.

Mrs. Carlson admitted in her pleading that she was a fiduciary to HMD. CP 1711, ¶ 25. That “judicial admission” is fully binding on her. *Mukilteo Ret. Apartments, L.L.C. v. Mukilteo Inv'rs L.P.*, 176 Wash. App. 244, 254–57 (2013). A judicial admission conclusively establishes the fact admitted:

Judicial admissions, such as the admission in respondents’ answer, have been defined as “stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and *dispensing wholly with the need for proof of the fact.*” 2 McCormick on Evidence, **664 *The*

⁴ RP 605:14–24.

Hearsay Rule and Its Exceptions § 254, at 142
(John W. Strong ed., 4th ed.1992) (emphasis
added).

Key Design Inc. v. Moser, 138 Wn. 2d 875, 893–94, *Madsen, J.*
concurring in part, dissenting in part (1999). The federal rule is the same.
Am. Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988).

All the evidence supports her admission: as noted above, Mrs. Carlson was in charge of the record-keeping for HMD, and was in substantial control of the farming operations to which the money was lent during 2003 to 2007. She wrote the checks. She caused the money to be deposited. In short, she was acting in the precise capacity for which the law imposes the non-delegable fiduciary duties set forth in HMD's opening brief. RCW 25.10.441(2)(a), (b); RCW 25.10.441(4). Nowhere in her brief does Mrs. Carlson cite any portion of the Washington Partnership Act, RCW Title 25.

Mrs. Carlson does not cite any authority to counter the black letter law submitted by HMD (App. Br. at 16) governing the obligations of a general partner such as Mrs. Carlson. *Bassan v. Inv. Exch. Corp.*, 83 Wn.2d 922, 927–28, 524 P.2d 233, 238 (1974) (citing *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928)); *In re Wilson's Estate*, 50 Wn. 2d 840, 847, 315 P.2d 287 (1957).

In short, the trial court was simply wrong in finding that Mrs. Carlson was not acting as fiduciary to HMD when she took the money out of HMD in 2003 and 2007, when she failed to properly document those transfers, when she failed to properly disclose them to the limited partners, when she failed to take any steps towards their repayment, and most egregiously, when she attempted to interpose the statute of limitations as a defense to the claim of HMD, the *cestui* of her trust. In this last connection, see *Goodwin v. Am. Sur. Co. of New York*, 190 Wash. 457, 478, 68 P.2d 619 (1937).

2. The 3 Year Statute of Limitations does Not Bar HMD's Claims

Because she controlled the HMD bank account as a general partner and bookkeeper, Mrs. Carlson held and controlled that property “as trustee” for the HMD partnership, as a matter of law without qualification. RCW 25.10 .441(2). She simply can’t escape that statutory command in view of her testimony. For example, she testified:

16 Q. Is it your position that you controlled HMD at that
17 time and had the power to control it and David had no
18 role or control in HMD?
19 A. Yes.⁵

And:

3 Q. And if HMD put money into Carlson Agribusiness for the

⁵ RE 171, April 9, 2014 Deposition of Mrs. Carlson, Page 107:16 to 19.

4 benefit of those farms, that has to be repaid back to
5 HMD, doesn't it?
6 A. I would hope that it does.⁶

Equally absent from Mrs. Carlson's Brief is any authority whatsoever to counter or question the blackletter law that: "statutes of limitations do not begin to run as between trustees and *cestuis* so long as the trust relation continues." *Robbins v. Wilson Creek State Bank*, 5 Wn.2d 584, 596-97, 105 P.2d 1107 (1940); *Arneman v. Arneman*, 43 Wn.2d 787, 797, 264 P.2d 256, 262 (1953).

Nor does Mrs. Carlson offer any evidence or contention from the record that she, at any time, provided Marla Contini, another general partner, with the information specifically required by RCW 25.10.431(2). This, despite her testimony that she thought, at least in 2013, it was she and Marla Contini that controlled the partnership:

2 Q. Under what authority did you take the money out and
3 close the account?
4 A. I was one-half of the general partnership. Marla was
5 the other.⁷

And, the trial court confirmed and she does not, in her Brief, deny that she was a "key part of the program." CP 289:5-22.⁸

⁶ RE 171, April 9, 2014 Deposition of Mrs. Carlson, Page 125:3 to 125:6.

⁷ RE 170, April 4, 2014 Deposition of Mrs. Carlson, Page 161:2 to 161:5.

⁸ with apologies to the court – this quotation was mis-cited at page 20 of HMD's Opening Brief as RP 297:21-298:16.

In short, Mrs. Carlson simply argues that the trial court found that Mrs. Carlson was not acting in a fiduciary capacity, and did not breach her fiduciary duty, but supplies absolutely no authority, statutory or case law, which could possibly support such findings. Nor does Mrs. Carlson present any factual argument on point. Her Brief doesn't even mention or discuss her Judicial Admission in her Answer. CP 1711, ¶ 25.

Indeed, the trial court did not cite any such authority, statutory or case law either. And the reason for that is equally clear – there simply is no such authority – as a matter of law, Mrs. Carlson was a fiduciary, and had fiduciary duties which she did not perform, and therefore breached.

3. HMD Appropriately Assigned Error.

Mrs. Carlson erroneously argues that under RAP 10.3(g), this Court has no power to consider Mary Carlson's admission that she was a fiduciary (CP 1722:2 ¶ 25), because HMD supposedly failed to assign error specifically enough to the trial court's refusal, at CP 295:5–9, to find that she was a fiduciary. Mrs. Carlson misreads the rule, which requires either a specific assignment of error to a trial court's enumerated finding of fact ("with reference to the finding by number") or that the nature of the error be "clearly disclosed in the associated issue." RAP 10.3(g). Even where there are enumerated findings of fact, discussing them in the body of the brief in relation to that issue sufficiently complies with the rule. *In*

re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 81 n.14, 101 P.3d 88, 96 (2004) (“Although VanDerbeek failed to make separate assignments of error, she did disclose which findings she disputed in her discussion of the associated issue. Thus, while separate assignments of error to each disputed finding would have been ideal, we conclude that VanDerbeek has sufficiently complied with RAP 10.3(g).”); *CalPortland Co. v. LevelOne Concrete LLC*, 180 Wn. App. 379, 392, 321 P.3d 1261, 1267 (2014) (To facilitate justice, in accordance with RAP 1.2(a), “Where a party's brief makes perfectly clear what part of the decision below is being challenged, however, we will overlook the party's failure to specifically assign error to it.”) The *Cowiche Canyon Conservancy* case on which Mrs. Carlson relies is not to the contrary: there, the trial court had held that the appellants lacked standing, based on a specific, enumerated finding of fact which the appellants did not assign error to or challenge; and the Supreme Court merely held that the appellants could not raise an alternative factual basis for standing for the first time on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Here, the trial court did not enumerate its finding, and HMD specifically referenced the trial court’s error, quoted and cited by page and line, at page 8 of its brief: “The court ruled orally that it would not find Mrs. Carlson to have breached her fiduciary duty for

purposes of the statute of limitations, because [quotations omitted] CP 293:22–295:9.” That is all the rule requires.

Indeed, it is more than the rule requires in this particular instance, because the trial court did not make an affirmative finding of fact on this subject at all. Rather, the trial judge ruled from the bench that he would **not** make a finding that Mrs. Carlson was a fiduciary in regards to whether her failure to disclose tolled the statute of limitations for the HMD loans, because for other reasons he would not hold her responsible for the HMD loans. CP 295. The trial judge carefully restarted his sentence to make clear that he was not making a finding: “I find, I don’t find that she acted in a fiduciary duty or violated that fiduciary duty.” *Id.*⁹ In other words, the trial court did not make a finding of fact on this subject, it simply refused to take Mrs. Carlson’s fiduciary duties into account.

That is exactly the error which HMD referenced in its statement of the issue: “The trial court erred by denying HMD recovery...based solely on the...statute of limitations, **despite the General Partners’ failure to disclose** to other partners and their reaffirmation of the debt.” HMD Br. at 3 (emphasis added). There was no dispute that Mrs. Carlson factually was

⁹ This is more than a matter of semantics: trial judges make it very clear when they intend to put a finding of fact in the record, by using affirmative phrases such as “I find,” “the Court finds,” or “the Court makes the following findings.”

a fiduciary—she admitted it in her Answer—the question was and is what effect her fiduciary status had on the statute of limitations. That is an issue of law, not of fact; thus HMD properly framed the issue for this Court, and, to whatever extent RAP 10.3(g) may require specific reference for such an issue, HMD met that standard as discussed above.

4. David Carlson’s Testimony Nullified or Revived the Statutory Period

Mary Carlson’s co-General Partner, David Carlson, acknowledged the debts to HMD, from the witness stand, in the context of the Complaint of HMD to collect those loans. That is the equivalent of a written acknowledgment. RCW 4.16.280; *Powers v. Hastings*, 20 Wn. App. 837, 846, 582 P.2d 897 (1978) *aff’d*, 93 Wn. 2d 709, 612 P.2d 371 (1980). The contention at page 46 of Mrs. Carlson’s Brief that: “there was no effort to collect the money,” is simply wrong – his testimony was made in HMD’s lawsuit to collect the money.

As noted, Mrs. Carlson testified, indeed insisted, that she was at least until trial, a general partner of HMD. The one case cited by Mrs. Carlson for the proposition that Mr. Carlson’s admission of the debt was somehow not effective against her, *In Re Tragopan Properties, LLC*, 164 Wn. App. 268, 263 P.3d 613 (2011), is not at all apposite. *Tragopan* solely addressed alleged revivals of the statutes of limitation by the listing of a

debt in bankruptcy schedules or unconfirmed Bankruptcy Plan of Reorganization. Relying on federal bankruptcy authority, the court held that such listings in bankruptcy pleadings would not work a revival, which would undermine the purpose of the Bankruptcy Act. No such public policy issue appears here. Further, the *Trapogan* parties were not in a fiduciary relationship. Mrs. Carlson fails to present any authority that might prevent Mr. Carlson's acknowledgment of the debt, if the statute of limitations otherwise had expired for the claim (which it hadn't) from fully reviving the claim under RCW 4.16.280.

B. Interest is Due to HMD from Mary Carlson for the Sequestered Funds for the Full Period of Sequestration.

1. Mary Carlson, Not the Trial Court, Caused the Forbearance.

The trial court recognized that Mrs. Carlson, on November 19, 2013, as a general partner of HMD, incorrectly withdrew and sequestered all of HMD's liquid assets. The trial court specifically held the funds were: "certainly denied to HMD." CP 291:21. The funds were wrongfully in the possession of Mrs. Carlson until they were placed in the registry of the court, on January 9, 2015. There can be no question that Mrs. Carlson's taking of all of HMD's liquid funds, without notice to the other general partners, and essentially hiding them, was a wrongful act that needed to be remedied and that denied HMD access to its own funds.

Indeed, when Mrs. Carlson’s lawyer learned of her action, he told her (quite correctly) to put the funds back.¹⁰ Taking the funds “was in the nature of the conversion for which the legal rate of interest, as the value of the use of money, was chargeable.” *Kahl v. Ablan*, 160 Wash. 201, 205–06, 294 P. 1010, 1012 (1931). The court easily computed interest at the statutory rate of 12% per annum for the first period of sequestration, that by Mrs. Carlson, from November 19, 2013 through January 9, 2014.

However, the court denied interest for the remaining pre-judgment period. The trial court’s reasoning is unclear in its only statement on the issue at CP 291:

. . . but I’m finding that the interest would only be applicable for the, period November 19 to January 7. After that it was a Court-ordered sequestration, I guess, of the monies. It was certainly denied to HMD. It was denied to everyone’s access for - in order to preserve the status quo.

The trial court provided no analysis or authority for the proposition that when funds are placed in the registry of the court upon an improper claim of a party, where the true owner is suing for possession of those funds, and the true owner prevails, a forbearance within the meaning of RCW 19.50 2.010 has not occurred. Prejudgment interest is awarded if the claim is (a) successful and (b) liquidated. Here it was both.

¹⁰ RE 171, April 9, 2014 deposition of Mrs. Carlson, pp. 129:12 to 130:24.

It is beyond question that if Mrs. Carlson had withdrawn her objection to the funds being paid to HMD, the funds would have been paid to HMD. She had that ability every minute of every day during the sequestration period. It was not the trial court's fault that Mrs. Carlson, through her counsel, made a spurious claim upon which the court sequestered funds in its registry. Nor is intent an issue. The statute simply says, if there's a forbearance on a liquidated amount, interest is payable. There is no logical or legal reason to differentiate between the first timeframe during which HMD was denied its funds—November 19, 2013 through January 9, 2014—caused by Mrs. Carlson drawing out all the funds and hiding them, and the second time frame during which HMD was denied its funds, which were forced into the Registry by Mrs. Carlson's improper claim.

The fact that Mrs. Carlson, when she took the funds, and during their sequestration, took the position (under oath) that she was in control of HMD and thus its primary fiduciary, imposed upon her the duty to make sure that HMD had access to its funds and to make full disclosure of its rights to the funds. Rather than do so, every day, during the sequestration period, she breached her duties by withholding the funds from HMD. There simply is no authority or basis for denial of interest

during the full period of sequestration. The calculation of interest to is contained in Appendix 2, and is \$46,538.02.

2. The \$226,485.05 in the Trial Court's Registry was a Liquidated Amount.

Mrs. Carlson misstates the law on pre-judgment interest. For purposes of prejudgment interest, a claim is “liquidated” where “the evidence furnishes data, which, even though challenged and successfully reduced, would make it possible to compute the amount with exactness.” *CKP, Inc. v. GRS Const. Co.*, 63 Wn. App. 601, 614, 821 P.2d 63, 71 (1991). It is “the character of the claim and not of the defense that is determinative” of whether an amount of money sued for is ‘liquidated’ in this sense. *Prier v. Refrigeration Eng'g Co.*, 74 Wm.2d 25, 33, 442 P.2d 621 (1968). Here, HMD sought an exact amount, \$226,485.05, and merely because Mrs. Carlson received a **set off** for a separate and distinct claim—payment for her terminated partnership interest—as a convenience, does not alter the liquidated nature of HMD’s claim to the liquid funds in the registry of the court. The payment of Mrs. Carlson’s partnership interest amount from the funds in the registry of the court was simply a convenience requested by her counsel, and agreed to as a matter of courtesy during a hearing. CP 316:7–317:23. HMD was clearly entitled to the full liquidated amount, but in a cooperative and collegial way

offered to resolve a separate part of the case by an accelerated payment to Mrs. Carlson. *Id.* That she turns around and argues that this accommodation somehow unliquidated the claim, evokes the old saw that no good deed goes unpunished.

C. The \$65,000 Valuation of Mary Carlson's 6.5 percent interest in HMD was Valid only if the Loans Made by HMD from 2003 through 2009 were Collectible Assets of HMD.

For the reasons set forth in HMD's opening brief, the award to Mrs. Carlson of \$65,000 for a 6.5 percent interest in HMD was based on an incorrect assessment or recollection of the evidence, and should be reversed. In this connection, we note that Mrs. Carlson also believes the court's assessment of that amount was incorrect. The parties apparently agree that those issues should be remanded for trial and HMD requests that this be done.

IV. CONCLUSION

For the reasons and upon the authorities set forth above, HMD should be awarded additional judgment principal amounts of \$153,400 and 165,000, jointly and severally, together with pre-judgment and post-judgment interest at the statutory rate, against Mr. and Mrs. Carlson, and an appropriate percentage of that judgment should be allocated to each of Mr. and Mrs. Carlson. Additionally, HMD should have judgment in the

amount of \$46,538.02, as interest on the distrained funds for the period January 8, 2014 to September 25, 2015, entered in the same manner.

Alternatively, the matter should be remanded to the trial court for further proceedings and directing entry of judgments as requested in the immediately preceding paragraph.

DATED this 28th day of December, 2017.

/s/ R. Bruce Johnston
R. Bruce Johnston, WSBA #4646
Johnston Jacobowitz & Arnold, PC
2701 First Ave, Suite 200
Seattle, WA 98121
(206) 866-3230
(206) 866-3234 (Fax)
bruce@rbrucejohnston.com
Counsel for Appellants

PROOF OF SERVICE

The undersigned declares under penalty of perjury that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the above-entitled action.

On December 28, 2017, I served or caused to be served a copy of the foregoing document upon counsel for Respondents by the Court's e-service system:

John A. Maxwell
230 S. Second St. #101
Yakima, WA 98901
Counsel for Mary Carlson

Sean Russel
Stokes Lawrence Velikanje Moore & Shore
120 N. Naches Ave
Yakima, WA 98901
Counsel for Mary Carlson and South 80

SIGNED this 28th day of December, 2017,

/s/ R. Bruce Johnston
R. Bruce Johnston, WSBA #4646

No. 344436
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CONSOLIDATED CASES

MARY ALICE CARLSON, Respondent, Cross-Appellant

v.

HUGH DAVID CARLSON, Appellant, Cross-Respondent

_____ AND _____

HMD LIMITED PARTNERSHIP, Appellant

v.

MARY ALICE CARLSON and SOUTH 80 LIMITED

PARTNERSHIP, Respondents

**APPENDIX TO REPLY OF APPELLANTS
HMD LIMITED PARTNERSHIP AND H. DAVID CARLSON**

R. Bruce Johnston, WSBA #4646
JOHNSTON JACOBOWITZ & ARNOLD, PC
2701 First Ave, Suite 200
Seattle, WA 98121
(206) 866-3230
(206) 866-3234 (Fax)
bruce@rbrucejohnston.com
*Counsel for Appellants Hugh David
Carlson and HMD Limited
Partnership*

This is to notify the Court of the following: An appendix was filed to the Opening Briefs of HMD Limited Partnership and of Hugh David Carlson, undersigned counsel for those Appellants believing that additional documents were required to complete the record on appeal. In fact, several of the documents in the appendix were already in the record, as stated in the following table. With regard to the remaining documents, a supplemental designation of Clerk's Papers is being filed.

Appendix #	Appendix Page	Description	Record
3	5-23	Excerpts of Mary Carlson Deposition 4/4/2014	RE 170
4	24-42	Excerpts of Mary Carlson Deposition 4/9/2014	RE 171
5	43-47	Order of February 12, 2014; Contempt Re: HMD Funds	CP 76-81
9	83-106	HMD Limited Partnership Agreement	PE 1.10
10	107-110	HMD 1999 Addendum to Partnership Agreement	PE 1.11
11	111-116	HMD 2000 Second Amendment to Partnership Agreement	PE 1.12

DATED this 28th day of December, 2017.

/s/ R. Bruce Johnston
R. Bruce Johnston, WSBA #4646
Johnston Jacobowitz & Arnold, PC
2701 First Ave, Suite 200
Seattle, WA 98121
(206) 866-3230
(206) 866-3234 (Fax)

bruce@rbrucejohnston.com
Counsel for Appellants

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Yakima, WA 98901
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120 N. Naches Ave
Yakima, WA 98901
Counsel for Mary Carlson and South 80

SIGNED this 28th day of December, 2017,

/s/ R. Bruce Johnston
R. Bruce Johnston, WSBA #4646

JOHNSTON JACOBOWITZ, ARNOLD, PC

December 29, 2017 - 3:06 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34443-6
Appellate Court Case Title: In re the Marriage of: Mary Alice Carlson and Hugh David Carlson
Superior Court Case Number: 13-3-00578-9

The following documents have been uploaded:

- 344436_Briefs_20171229150507D3248200_4288.pdf
This File Contains:
Briefs - Appellants Reply - Modifier: Amended
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A copy of the uploaded files will be sent to:

- Nathan@rbrucejohnston.com
- bruce@rbrucejohnston.com
- djw@stokeslaw.com
- maxwell@mftlaw.com
- sean.russel@stokeslaw.com
- stafford@mftlaw.com

Comments:

Refiling with appendix attached per email from Ms. Roberts

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